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February 24, 1997

Ms. J--- H---
Price Control Supervisor
S--- M--- S---
P.O. Box XXXX
---, CA XXXXX-XXXX

RE: [No Permit Number]
Food Products

Dear Ms. H---:

I am answering your letter to me dated December 19, 1996. You ask about the application of sales tax to S--- M---'s sales of various food items. You attached product labels for review. The products in which you are interested are Zbars, Ensure Plus, Ensure Light, Boost, Nutri-Need, Nutri-Need Plus, Resource, MET-Rx Engineered Food, and MET-Rx Food Bar Engineered Nutrition.

OPINION

A. Sales and Use Tax Generally.

In California, except where specifically exempted by statute, Revenue and Taxation Code section 6051 imposes a sales tax, computed as a percentage of gross receipts, upon all retailers for the privilege of selling tangible personal property at retail in this state. (Unless otherwise stated, all statutory references are to the Revenue and Taxation Code.) "[I]t shall be presumed that all gross receipts are subject to tax until the contrary is established. The burden of proving that a sale of tangible personal property is not a sale at retail is upon the person who makes the sale" (§ 6091.) "Exemptions from taxation must be found in the statute." (Market St. Ry. Co. v. Cal. St. Bd. of Equal. (1953) 137 Cal.App.2d 87, 96 [290 P.2d 201].) "The taxpayer has the burden of showing that he clearly comes within the exemption." (Standard Oil Co. v. St. Bd. of Equalization (1974) 39 Cal.App.3d 765, 769 [114 Cal.Rptr. 571].)

B. Food Products Exemption

Section 6359, as interpreted and implemented by Regulation 1602, provides an exemption from sales and use taxes for sales of food products for human consumption under certain circumstances. Subdivisions (1) & (2) of Regulation 1602(a) contain lists of products which, either singly or in combination, are considered “food products.” (Sales and Use Tax Regulations are Board promulgations which have the force and effect of law.) Subdivision (a)(5), however, excludes certain items from the definition of “food products” as follows:

“(5) ‘Food products’ do not include any product for human consumption in liquid, powdered, granular, tablet, capsule, lozenge, or pill form (A) which is described on its package or label as a food supplement, food adjunct, dietary supplement, or dietary adjunct, and to any such product (B) which is prescribed or designed to remedy specific dietary deficiencies or to increase or decrease generally one or more of the following areas of human nutrition:

1. Vitamins
2. Proteins
3. Minerals
4. Caloric intake"

Regulation 1602 subsequently restricts this limitation on the definition of “food products” as follows:

“Tax, however, does not apply to any such products which either are exempted by Section 6369, respecting prescription medicines, or are complete dietary foods providing the user in the recommended daily dosage with substantial amounts of vitamins, proteins, minerals and foods providing adequate caloric intake. An example of the latter is a food daily requirement providing the user with the following:

1. 70 grams of high quality protein
2. 900 calories
3. Minimum daily requirements as established by the regulations of the Federal Food and Drug Administration of the following vitamins: A, B1, C, D, Riboflavin, and Niacin or Niacinamide; the following minerals: Calcium, Phosphorus, Iron and Iodine.”

In interpreting and implementing the broad provisions of section 6359(c), Regulation 1602(a)(5) thus sets up a two-step analysis. The threshold question is whether or not the food product under discussion is in one of the enumerated forms--liquid, powdered, granular, tablet, capsule, lozenge, or pill. If so, then its sales are taxable if one of the two following conditions also occurs: (A) its label or package describes it as a food supplement, food adjunct, dietary supplement,

or dietary adjunct; or (B) it is prescribed or designed to remedy specific dietary deficiencies or to increase or decrease generally the intake of vitamins, protein, minerals, or calories.

C. Tax Consequences.

1. Food Bars. Food Bars are not one of the seven product forms listed in the regulation. As a result, they are not excluded from the definition of “food products” contained in Regulation 1602(a)(1). (Annot. 245.1205.5 (3/11/91).) Sales and Use Tax Annotations are excerpts from previous Board staff opinion letters and serve as guides to staff positions.) Sales of MET-Rx Engineered Nutrition Food Bar are thus exempt from tax.

Zbars are, however, another matter. Medicines are excluded from the definition of “food products.” The copy of the package has the words “Pharmacy Item” printed on it. The copy of the flyer calls it a “medical food.” The flyer describes the use of the product as follows”

“When used as part of you diabetes dietary management regimen, **Zbar** puts you in control-- reducing the risk of increased episodes of low blood sugar. A clinical study conducted with **Zbar** shows that **Zbar** may regulate blood glucose levels up to nine hours in many people.”

It thus seems that Zbars are primarily designed to regulate blood sugar levels to treat the symptoms of diabetes. ZBar is a “medicine” under Regulation 1591(b)(1), with the result that it does not qualify as a food product under Regulation 1602(a)(4). For sales of medicines to be exempt, the sales must occur in one of the ways provided by Regulation 1591(a). Over-the-counter sales are not one of the covered methods. (See, e.g., Annot. 425.0143 (3/23/78).) Sales of Zbars are thus subject to tax.

2. Liquid Nutrition.

We have previously determined that “Ensure” and “Ensure Plus” Liquid Nutrition are food products the sales of which are exempt from tax. (Annot. 245.1420 (10/31/84).) The package for “Boost” calls it a “nutritional energy drink,” stating that it “provides balanced nutrition with protein, carbohydrates, and 25 key vitamins and minerals.” It is thus a product in powder form specially formulated to provide a high nutrition source, the sales of which are subject to tax under Regulation 1602(a)(5). The label for “Nutri-Need” terms it a “Complete Nutritional Supplement,” and the label for “Nutri-Need Plus” calls it a “Complete Hi-Calorie Supplement.” These are products in liquid form, the labels of which say they are food supplements. Their sales are subject to tax under Regulation 1602(a)(5). Sales of “Resource,” called a “Liquid Nutritional Food” with no dietary claims, are exempt from tax under Regulation 1602(a)(1). The package of “Met-Rx Engineered Foods Total Drink Mix” (a powder) bears this legend: “Use this product as a food supplement only.” It is thus excluded from the definition of “food products” under Regulation 1602(a)(5). As a result, its sales are subject to tax.

For your information, I have included copies of Regulations 1591 and 1602, as well as Board of Equalization Pamphlet Number 31, "Grocery Stores." I hope the above discussion has answered your question. If you need anything further, please do not hesitate to write again.

Sincerely,

John L. Waid
Senior Tax Counsel

JLW:sr

Enclosure: Regs. 1591 & 1602
 Pamphlet No. 31